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No. 00-1829

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STANLEY R. STRAUSS
(*Counsel of Record*)
J. ROBERT BRAME, III
HAROLD P. COXSON
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855

Attorneys for the Council on Labor Law Equality

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTEREST OF *AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of employers formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act.[1] Through the filing of *amicus curiae*

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a

briefs and other forms of participation on issues which affect a cross-section of industry, COLLE provides a specialized and continuing business community effort to promote a balanced approach in the formulation and interpretation of national labor policy. Over the years, COLLE has filed *amicus curiae* briefs in many of the landmark labor law cases before the National Labor Relations Board and the federal courts, including the United States Supreme Court. *See e.g.*, *Caterpillar, Inc. v. Int'l Union*, No. 96-1925 (1997); *International Bd. of Elec. Workers v. Colorado-Ute. Elec. Assn.*, No. 91-1284 (1992).

The decisions of the National Labor Relations Board ("NLRB") and the Ninth Circuit in this case erroneously undercut the doctrine enunciated by this Court in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), that a successor employer is, with a single exception (irrelevant in this case), free to establish the initial terms and conditions of employment of its employees. Here, despite the breadth and clarity of the *Burns* ruling—a ruling that satisfies the need of successor employers for uniform guidance as to their potential liability under a predecessor's collective bargaining agreement ("CBA")—a successor employer that took over a moribund business in a Section 7 bankruptcy proceeding has been saddled with the employment terms and conditions of the failed employer. In addition, this case significantly impacts the current movement in the United States towards business restructuring which, in turn, has an important effect on labor-management relations and the administration of the National Labor Relations Act.

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monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Letters of consent are being filed simultaneously with this brief with the Clerk of the Court.

For this reason, COLLE is filing this brief as *amicus curiae* in support of Petitioner Advanced Stretchforming International, Inc. ("ASI").

PRELIMINARY STATEMENT

A. This case had its origins in an auction conducted in 1992 by the Bankruptcy Court in which the plant and assets of Petitioner's predecessor, Aero Stretch, Inc. ("Aero"), were acquired by Petitioner. Aero had been operating the business—stretchforming structural metal body components used in the aircraft industry—and was party to a CBA with Local 509 of the United Automobile, Aerospace and Agricultural Implement Workers ("UAW") covering its production and maintenance employees.

Following its filing for bankruptcy protection in June 1992, Aero, without the UAW's consent, failed to adhere to provisions of the CBA by not implementing called-for employee wage increases, by stopping its contributions to an employee 401(k) plan, and by disregarding contractual job classifications in making wage assignments. In addition, after the filing, Aero had gradually laid off its employees, reducing the number to 17; and it also had sought—unsuccessfully—to sell its business to several prospective buyers. Pet. 5, App. 72a-73a.

In November 1992, the Bankruptcy Court directed the termination of the remaining Aero employees and approved the sale of Aero's assets to Stephen Brown, a local entrepreneur, who then incorporated the business as Advanced Stretchforming International, Inc., the Petitioner herein. Pet 5, App. 73a.

On November 30, 1992, Aero's remaining 17 employees were informed by Eric Cunningham, Aero's Director of Operations, that their employment was terminated. Cunningham then—this time acting as ASI's agent—told the Aero employees that the new company, ASI, would hire some of

Aero's employees, but without their previous seniority, and he further informed them that there would be "no union at ASI." The next day, ASI hired eight of the 17 remaining Aero employees who, during their employment interviews, were told that ASI was not assuming Aero's collective bargaining agreement and that the terms and conditions of their employment would be inferior to those under that agreement. Pet. 5-6, App. 73-74a, 77a-79a.

B. A panel majority of the Ninth Circuit upheld the NLRB's determination that Petitioner ASI was legally precluded from setting the initial terms and conditions of its newly-hired employees and was, instead, required to place in effect the substantive terms of Aero's collective bargaining agreement with the UAW. Both the Board and the panel majority rested their decisions on the single fact that Cunningham's "no union" announcement constituted an unfair labor practice under the National Labor Relations Act.

C. In its certiorari petition ASI has shown persuasively why, for several reasons, including a split of authority in the Courts of Appeals, its petition should be granted. Chief among those reasons is the fact that the decisions of the NLRB and the Ninth Circuit are in direct conflict with this Court's seminal rulings in *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972). In *Burns*, this Court recognized that the proper use of resources, including human resources, requires that successor employers be generally free to establish the initial terms and conditions of employment under which acquired businesses will be operated. Clearly, this principle is particularly important where, as here, an acquiring entrepreneur necessarily must reorganize, or redirect, a stagnant or failing business. Moreover, as emphasized both by Judge O'Scannlain in his dissent and by Petitioner, ASI's improper announcement that it would operate a "no union" shop neither impels nor sanctions a departure from the *Burns* doctrine. In *Burns*, the successor

employer, like ASI here, was also tagged with an unfair labor practice similarly affecting employees' choice of a bargaining agent—the facially indistinguishable unlawful act of requiring its newly-hired employees to join and support a union other than the one that had previously represented them (402 U.S. at 275, 279); and in *Burns*, despite its unfair labor practice, this Court allowed the successor employer to set the initial terms and conditions of employment different from those of the predecessor employer.

As the NLRB and the panel below recognized, this Court's lone exception to the *Burns* doctrine—the so-called "perfectly clear" exception—is here inapposite.[2] Instead, the decisions below impose a punitive sanction—euphemistically labeled a "forfeiture"—in order to circumvent the *Burns* holding and compel terms and conditions of employment never agreed to by the successor employer. These decisions clearly conflict with this Court's authoritative statement that ". . . the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 104 (1970), quoting from S. Rep. No. 573, 74th Cong., 1st Sess.12 (1935); and see also *id.* at 105, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

Whether "forfeiture" as a punitive sanction is appropriate when a successor employer engages in an unfair labor

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[2] In *Burns*, the Court suggested that the one exception to the general rule that a successor employer may set initial terms and conditions is where "it is perfectly clear that the new employer plans to retain *all* of the employees in the unit." *Id.* at 294. (emphasis added). Under the "perfectly clear" exception, the successor employer nevertheless retains the right to set initial terms and conditions of employment, but must consult with the employees' bargaining representatives before setting the new terms and conditions. The exception is not applicable under the facts in this case. That the panel majority saw fit to amend its first decision to eliminate reliance on the "perfectly clear" exception underscores the irrelevance of the doctrine here.

practice unrelated to the "perfectly clear" exception, or whether the "forfeiture" penalty is ever appropriate under this Court's decisions in *Burns*, are important issues for the Court to resolve. Absent resolution, the decisions below and the split of authority in the Circuits will have the perverse effect of discouraging investment in failing or troubled companies and making union-represented workplaces especially unattractive candidates for entrepreneurial investors.

SUMMARY OF ARGUMENT

The erroneous decisions below of the National Labor Relations Board and a panel majority of the Ninth Circuit circumvent this Court's ruling in *Burns* by allowing the Board to impose an impermissible penalty which retroactively applies contract terms to which the successor employer never agreed, thus denying successor employers the ability to establish initial terms and conditions of employment for newly-acquired businesses. As a result, the decisions below eviscerate the public policies stated in *Burns* by discouraging acquisitions and investments, especially those involving the unionized operations of failing or failed employers.

ARGUMENT

BY ASSESSING AN IMPERMISSIBLE PENALTY AGAINST A SUCCESSOR EMPLOYER, THE DECISIONS BELOW UNDERCUT THE SOUND ECONOMIC AND CONGRESSIONAL POLICIES UPON WHICH *BURNS* IS GROUNDED.

The decisions below have consequences extending beyond the facts and the parties in this case because the decisions create the very obstacle to revitalizing a failing or failed employer that this Court sought to eliminate in *Burns*. For nearly three decades, successor employers have relied on the bedrock principle in *Burns* that they are not "bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the predecessor] and

to which [the successor] had in no way agreed." 406 U.S. 272, 281-82. Thus, successor employers understand that under *Burns* they are free to set the initial terms and conditions of employment. *Id.* at 294-95.

The public policy underlying this Court's *Burns* doctrine has served the nation well over the decades, encouraging countless entrepreneurs to attempt to rescue struggling businesses without being forced to accept the financial or operational encumbrances which perhaps contributed to the failing state of the companies. As the *Burns* Court explained:

> A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contracts may make these changes impossible and may discourage and inhibit the transfer of capital.

406 U.S. at 287-88.

Indeed, it is bad public policy to impede successor employers in exercising the right to set initial wages and, perhaps even more importantly, core operational changes as fundamental as job assignments and content, and the technology which may be necessary to resuscitate or resurrect a failing or failed employer. It is even worse policy to limit the successor employer's freedom arbitrarily and after its commitment.

The implications of the decisions below are quite broad, especially insofar as they could have a chilling effect upon the current trend in the United States involving corporate mergers and acquisitions.[3] Thus, it is important to recognize

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[3] There has been a steadily increasing number of pre-merger and pre-acquisition filings that must be reported to the Federal Trade Commission and the U.S. Department of Justice's Antitrust Division. In FY 1999,

that in an era of market-driven corporate restructuring, mergers, acquisitions, and downsizing, national labor policy should encourage purchasers to revitalize failing businesses, thereby preserving employment opportunities and enhancing competition. If, however, decisions such as those below impose retroactive application of pre-existing terms and conditions of employment to which the successor never assented, the uncertain and potentially open-ended liabilities will discourage entrepreneurs from investing in companies where necessary changes in business operations have the potential of being reversed by the NLRB years after the investment.

Furthermore, results such as these are certainly not in the interest of employees confronted with the loss of jobs. Although the national economy currently enjoys a relatively low rate of unemployment—but one that is steadily increasing in 2001—the fact remains that downsizing and layoffs as a result of corporate restructuring continue to affect more than one million employees annually.[4] In the first half of FY 2001, layoffs due to internal company restructuring

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there were 4,642 such filings, which represented a 203 percent increase over the 1,529 transactions reported more than a decade earlier in FY 1989. U.S. Department of Justice, Federal Trade Commission and Antitrust Division, Annual Report to Congress, FY 1999, p2.

[4] In 1992, when Petitioner acquired its failing predecessor employer's assets through a bankruptcy sale, the nation was coming out of a recession and the unemployment rate was at 7.3 percent, with over 9.3 million workers unemployed. U.S. Department of Labor, Bureau of Labor Statistics, "1992: Job Market in the Doldrums," *Monthly Labor Review*. Feb. 1993, pp. 3-14. From the summer and early fall of 1992, at the very time Petitioner was negotiating to resuscitate the failing business and maintain the jobs of at least some of its employees, the unemployment rate among factory workers, especially those in fabricated metal products, rose sharply. "From the beginning of 1989 through the end of 1992, manufacturing employment fell by about 1.5 million, with the number of factory jobs declining in either a trickle or a gush at various times." *Id.* at 8-9. Current job losses for FY 2001 are roughly equivalent to the 1992 figures.

(bankruptcy, business ownership charges, financial difficulty, and reorganization) were at 983,337—the highest level since 1992—with the heaviest job losses occurring in manufacturing and technology. "*Job Cuts Nearing One Million in 2001; Survey Shows Largest Cut Ever in July,*" BNA Daily Labor Report (No. 151), Aug. 7, 2001.[5]

While statistics concerning the increasing number of mergers, acquisitions and other forms of corporate restructuring are forceful reasons why the *Burns* doctrine retains vitality in today's economy, even more compelling are the business bankruptcy statistics. Whereas *Burns* involved successorship of an on-going, viable business, the situation in this case involves the even more compelling need to set initial terms and conditions by the successor to a failed employer and the salvage of a business in liquidation.

In part, perhaps, because investors are free to acquire failing business without the encumbrances of existing terms and conditions under the predecessor's collective-bargaining agreement, as well as a favorable economy, business bankruptcy filings have declined over the past decade. But more recently, bankruptcy filings in the first quarter of FY

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[5] Even during years of high economic growth, such as 1995-1996 when 5 million jobs were added to non-farm payrolls and the unemployment rate remained at approximately 5.5 percent, there was also high worker displacement. "Despite these favorable labor market conditions, between 1995 and 1996, 2.2 million workers aged 20 years and older lost jobs they had held for 3 or more years because their plants or companies closed down or moved, their positions or shifts were abolished, or their employer did not have enough work for them to do." Hipple, "*Worker Displacement in the mid-1990s,*" U.S. Department of Labor, Bureau of Labor Statistics, July 1999, p. 15. Such job losses also tax the unemployment insurance system. For example, for the fiscal year ended September 2000, the total number of initial unemployment claims filed rose to over 1,188,580. "*Mass Layoffs Up Sharply,*" BNA Daily Labor Report (No. 212), Nov 1, 2000, D-3.

2001 again increased.[6] American Bankruptcy Institute, "U.S. Bankruptcy Filing Statistics," available at http://www.abiworld.org.

In sum, preserving the *Burns* holding is vital for employers and employees alike, especially, as here, in the context of a failing or failed employer where the successor may be able to salvage the business and create new or save existing jobs. Moreover, sound economic policy dictates, we submit, that entrepreneurial bidders for companies possibly faced with uncertain futures must be able to rely on *Burns* in establishing initial terms and conditions under which they will operate the successor business without the added uncertainty of retroactive imposition of the failed predecessor's CBA foisted on them by the NLRB.

CONCLUSION

For the foregoing reasons and those set forth persuasively by Petitioner, the certiorari petition should be granted.

Respectfully submitted,

STANLEY R. STRAUSS
(Counsel of Record)
J. ROBERT BRAME, III
HAROLD P. COXSON
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
2400 N Street, N.W.
Washington, D.C. 20037
(202) 887-0855

Attorneys for the Council on Labor Law Equality

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[6] In FY 2000, business bankruptcy filings totaled 35,325, compared with 38,625 in FY99; 47,125 in FY98; 54,252 in FY97; 53,520 in FY96; 51,042 in FY95; 54,425 in FY94; and 64,857 in FY93.